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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-840

BARBARA LEE SHIRLEY,

Petitioner,

vs.

WILMET G. BURNS, et al.,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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BARBARA LEE SHIRLEY,

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PETITION FOR A WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Sixth Circuit

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, reversing a decision of the United States District Court for the Northern District of Ohio, Eastern Division.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals has not as yet been officially reported. It is set forth in the Appendix, infra, at pp. A-26 - A-35. It has been unofficially reported

at 11 Fair Employment Practice Cases 549 (6th Cir. 1975). The opinion of the United States District Court, although not yet officially reported, can be found at 11 Fair Employment Practice Cases 542 (N. D. Ohio 1974). It is also set forth in the Appendix, infra, at pp. A-1 - A-25.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was rendered and filed on September 16, 1975. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals properly apply the standards of Wood v. Strickland, 420 U. S. 308 (1975), in determining that, although the individual named defendants had acted unconstitutionally in terminating the plaintiff's contract of employment, they nevertheless were immune from back pay liability?

2. Do the standards of Wood v. Strickland, 420 U. S. 308 (1975), enunciated in the specific context of the disciplining of students, apply in the context of the termination of a teacher's contract of employment?

STATUTORY PROVISION INVOLVED

Title 42 U.S.C. § 1983. Civil Action For Deprivation of Rights.

Every person who, under color of

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any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The petitioner, Barbara Lee Shirley, was employed during the 1971-1972 school year by the Chagrin Falls Exempted Village Schools Board of Education, both as a physical education teacher and under a supplemental contract whereby she agreed to supervise Girl's intramural sports. During November, 1971, the petitioner discovered that she was pregnant and due to give birth in late June, 1972. Upon notifying her supervisor that she was pregnant, she was informed that there was in effect a mandatory maternity leave policy, and that she should contact the Assistant Superintendent of Schools, Loyal Cornelius, for further information. Upon notifying Mr. Cornelius of her condition, petitioner was informed of the specifics of the school board policy, which provided that "[I]n the case of pregnancy, the employee shall resign and/or her contract shall become null and void at the end of the fifth (5th) month of pregnancy, or at the end of the semester, whichever occurs

first. Abuse of this policy will be a just cause to prevent future re-employment. The employee will not be permitted to return to her former position earlier than three months following the birth of her child and then only upon presentation of a physician's certificate that she is able, in all ways, to perform all of the duties of her assignment."

Although she expressed at that time a desire to continue to work beyond the period outlined by the policy, Assistant Superintendent Cornelius told petitioner that, although he would check with the individual school board members, he assumed that she would have to follow the established policy.

On December 7, 1971, petitioner notified the school board members by letter that she wished to be permitted to teach until the end of her fifth month of pregnancy (March 1, 1972), rather than be forced to leave at the end of the semester. Assistant Superintendent Cornelius never submitted petitioner's letter to the board at a formal meeting. He testified, however, that on December 20, 1971, he discussed the matter with individual board members at an "executive session" or "work-study session", of which no minutes were kept. The next day petitioner received a letter from the Assistant Superintendent notifying her that it was "the feeling of the board that we should adhere to our existing policy pertaining to teacher pregnancy." The letter also requested her to submit a letter of resignation which "will be . . . approved" by the board at its next formal meeting. Following this directive,

Mrs. Shirley submitted a letter of resignation to the board, which voted to accept it at its regular meeting January 17, 1972. Petitioner's last day of teaching was January 28, 1972.

Following the birth of her child, June 21, 1972, petitioner left the state and did not seek to renew her employment relationship with the school board.

Petitioner instituted this action April 4, 1973, in the Northern District of Ohio, Eastern Division, alleging that she had been deprived of her rights secured by both the Fourteenth Amendment to the Constitution of the United States and the Civil Rights Act of 1871 (Title 42 U.S.C. § 1983). The District Court's jurisdiction was invoked pursuant to Title 28 U.S.C. § 1343(3) and (4). In her action she named as defendants the Chagrin Falls Exempted Village Schools Board of Education (as an entity), the five members of the board (both individually and in their official capacities as members of the board), and the Superintendent of Schools (both individually and in his capacity as superintendent).

Specifically, the petitioner alleged that the pregnancy policy of the Board of Education deprived her of rights, privileges and immunities secured to her by the Constitution and laws of the United States. She prayed for a judgment making her whole by an award of back pay and other relief.

On May 7, 1973, school board members, Ann Malmquist, John Evans, Wilmet G. Burns,

Lydia Champlin, and Dr. William Cox moved to dismiss the complaint against them individually. In ruling on this motion to dismiss, the District Court concluded that because the Board of Education was a body politic and corporate under Ohio law, it was not a "person" subject to liability under Title 42 U.S.C. § 1983. Consequently, the Court, sua sponte, dismissed the action against the defendant school board in spite of the fact that the board had filed an answer to the complaint. The motion of the individual defendants to dismiss was overruled. As a result, only the personal defendants, both in their individual and official capacities, remained before the Court.

One answer was filed on behalf of the Superintendent Cornelius and a separate answer on behalf of the individual members of the school board.

Defendants remaining before the Court, in one answer filed on behalf of defendant Cornelius and in a separate answer filed on behalf of the individual members of the school board, denied that the petitioner had been deprived of her statutory or constitutional rights. As affirmative defenses, both answers asserted that the actions taken by the defendants with respect to the petitioner were "consistent with and in conformity with the laws of the State of Ohio and the United States of America, and in conformity with the decisions rendered at that time by state and federal courts exercising jurisdiction." None of the defendants requested a jury trial.

At trial defendants abandoned any attempt

to justify their pregnancy policy in light of Cleveland Board of Education v. LaFleur, 414 U. S. 632 (1974). Instead, the defendants particularized their affirmative defenses by alleging that they were entitled to rely upon the doctrine of official immunity and that their actions were in good faith.

Only four of the six named defendants presented testimony to support an affirmative defense of "good faith".

Defendant Champlin, one of the board members who voted in favor of accepting petitioner's resignation, testified that she had no knowledge of any cases involving the legality of mandatory maternity leaves.

Defendant Burns' only testimony was that he was aware of court decisions concerning the legality of similar policies. He could specifically recollect, however, nothing more than that the late Judge Connell had ruled in favor of the Cleveland Board of Education in the LaFleur case.

Defendant Cox testified that his only knowledge of the activity in the courts was information related to him by the Superintendent of Schools, whom he knew was not a lawyer. Although Mr. Cox testified that in December, 1971, he was aware of the decisional law, both locally and in other courts nationwide, his only specific remembrance was that the LaFleur case had been decided "in favor of the Board." His testimony revealed that neither he nor any of

the other defendants had ever sought legal advice from an attorney as to the legal status of mandatory maternity leave policies, nor had any defendant ever read the district court decision in LaFleur. Defendant Cox further testified that he had the responsibility only of insuring that the board's policies were being enforced. In his opinion it was the Superintendent's obligation to keep individual board members up to date on judicial developments.

Defendant Cornelius' only testimony was that he kept abreast of the developments in the area of pregnancy policies.

Defendant Malmquist, although present at trial, did not testify.

Defendant Evans was vacationing in Canada at the time of trial and presented no testimony. Neither defendant Malmquist nor defendant Evans made any attempt to prove any facts to support their affirmative defenses.

After trial and upon consideration of all the evidence, the Court concluded that the individual defendants did not rely to any extent upon the district court decision in LaFleur, but relied solely upon the board's pregnancy policy. It was the Court's finding that the petitioner's request to continue working until the end of March had been denied only because of the convenience to the board and to the school administration. In addition, the Court concluded that, even if the defendants had proved that they had relied in good faith upon the decision of the District

1. By statute, the county prosecutor is the legal advisor to the school board members. Ohio Revised Code, § 309.09.

Court in LaFleur, that reliance could reasonably only serve to support their policy requiring resignation at the end of the fifth month of pregnancy. The Court specifically held that an end of semester resignation policy could not be justified under the district court holding in LaFleur.

Thus, finding that the individual defendants had failed to establish facts sufficient to prove their defense of qualified official immunity, the Court ordered the individual defendants (except defendant Cornelius), to pay petitioner the compensation due her under her contract from January 28, 1972, until March 1, 1972.

Upon appeal from the award by the individual defendants, the United States Court of Appeals for the Sixth Circuit reversed the money judgment of the District Court. The Court of Appeals found the question before it to be whether the action taken by the defendants with regard to the petitioner was not only violative of her constitutional rights, but was also at that time so in disregard of the settled, indisputable law and unquestioned constitutional rights that it cannot reasonably be characterized as being in good faith. Relying upon Geduldig v. Aiello, 417 U. S. 484 (1974), and Cleveland Board of Education v. LaFleur, supra, the Court of Appeals concluded as a matter of law that it was reasonable for all of the defendants to have enforced their mandatory maternity leave policy against petitioner.

Petitioner seeks to have this Court review the Sixth Circuit Court of Appeals' decision with

respect to its application of the test of qualified official immunity.

REASON FOR GRANTING THE WRIT

To Resolve A Conflict With The Rulings Of This Court And Other Circuits Concerning The Required Proof Of An Affirmative Defense Of Qualified Immunity

A. Earlier Decisions Of This Court

This Court has already decided four cases concerning the scope of the immunity which protects various governmental officials from liability for damages under § 1983.

In Tenney v. Brandhove, 341 U. S. 367 (1951), this Court held that legislative immunity is absolute and does not depend upon the intentions or motivations of the legislators. The common law doctrine of immunity was recognized by this Court in Pierson v. Ray, 386 U. S. 547 (1967), to extend both to officers of the judiciary and to police officers. The Court's decision in Pierson held that although the immunity of judges was absolute, a verdict for the police officers would follow if an arrest was unconstitutional "if the jury found that the officers reasonably believed in good faith that the arrest was constitutional." Id. at 557. To find that an officer held a reasonable belief in good faith necessarily must require demonstrations of fact.

In considering the immunity of a chief executive officer of a state, the senior and subordinate officers of the State's National Guard, and the president of a state-controlled university, this Court, in Scheuer v. Rhodes, ____ U.S. ____, 94 S. Ct. 1694 (1974), specifically noted that conclusions of good faith are not to be judicially noticed and that a determination of good faith must be based only upon evidence which is before it. Id. at 1693.

In Scheuer, the scope of immunity of executive officers was clearly enunciated:

> [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that afford a basis for qualified immunity of executive officers for acts performed in the course of official conduct." Id. at 1692.

Scheuer, thus reaffirmed for executive officers the same two factual requirements of proof set forth in Pierson v. Ray for a police officer to

establish immunity: a good faith belief and reasonable grounds for such belief.

The principles set forth in Scheuer were applied specifically to school board members in Wood v. Strickland, supra, decided by this Court last term. In Wood, a school discipline case, this Court commented further on the two aspects of the test earlier enunciated and pointed out that while an official might "be acting sincerely and with a belief that he is doing right", this would not necessarily suffice to immunize him from damages. As noted by Justice Powell in a separate opinion, the standard imposed by Wood upon school board members appeared to be more severe than that imposed upon those governmental officials before the Court in Scheuer. In Wood the Court held that a good faith belief based on "ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives" could no more justify the violation of a student's rights than actual malice. The Court further held that "a school board member . . . must be held to a standard of conduct based not only on permissible intention, but also on knowledge of the basic unquestioned constitutional rights of his charges." 95 S. Ct. at 1000-1001.

B. Recent Decisions In The Circuits

Since the announcement of the standard in Wood, three courts of appeals other than the Court of Appeals for the Sixth Circuit have considered its proper application. In McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975) cert. granted, 44 U.S.L.W. 3263 (Nov. 3, 1975)(No. 75-44), the

Court of Appeals for the Fourth Circuit, sitting en banc, found that the two part standard of Wood demanded specific findings and required that a showing of good faith belief be made before the reasonableness of that belief could be considered. In the Court's view,

> . . . defendants may not avail themselves of the defense until they have proved that they had a good faith belief in the legality of what they did. Since what is sought to be proved is a matter of defense, the burden of proof is upon them.
> Id. at 370.

The Fifth Circuit in Schiff v. Williams, 519 F. 2d 257 (5th Cir. 1975), commented upon the application of the Wood standard to a situation where, like here, individuals were unconstitutionally dismissed from their jobs. As in the present case, the district court found that the defendant in Schiff had not been motivated by malice in abridging the plaintiffs' rights. The district court in Schiff, as here, also found that the defendant had failed to seek legal advice prior to dismissing the plaintiffs from their jobs. The district court in Schiff, concluded, as did the district court in the present case, that the defendant had failed to establish his defense of good faith immunity. The Fifth Circuit, in affirming the district court's decision in Schiff, noted that the "district court's finding that food faith immunity was not available is based on a proper concept of the character and scope of this defense." 519 F.2d at 261.

In Hostrop v. Board of Junior College District No. 515, et al., 523 F.2d 569 (7th Cir. 1975), another wrongful discharge case, the Court of Appeals for the Seventh Circuit recognized that the standards of

Wood, while developed in the framework of a school discipline case, were "equally applicable to conduct of board members affecting the rights of teachers and administrators". Id. at 577. The Seventh Circuit, like the Fourth Circuit, recognized that the test of acting "sincerely and with a belief that he is doing right" must be met by a defendant before proceeding with the second aspect of the two part standard. In Hostrop, the Court of Appeals went on to point out that the question of whether the defendant "'knew or reasonably should have known' that his act 'would violate the constitutional rights' of the plaintiff" (citing to Wood at 1000-1001), could only " . . . be answered in the light of the law as it existed . . . when the action was taken." 523 F.2d at 577.

C. Application Of The Test Of Qualified Immunity To The Facts Of The Present Case

In concluding that the individual defendants were immune from an award of damages under §1983, the Court of Appeals for the Sixth Circuit purported in the present case to take guidance from this Court's decision in Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992 (1975). Thus, in reviewing the decision of the district court, the Court of Appeals inquired "whether the school board action taken with regard to Mrs. Shirley was not only violative of her constitutional rights, but was also at that time so in disregard of the 'settled, indisputable law' and 'unquestioned constitutional rights' that it cannot reasonably be characterized as being in good faith."

Applying this test tothe record before it, the Court held that to compel the defendants to respond in damages unless there had been an adjudication that their existing pregnancy policy was unconstitutional would be to hold that they were "charged with predicting the future course of constitutional law." The Court did not discuss, and therefore apparently did not find relevant, the fact that two defendants presented no evidentiary support for their alleged affirmative defense.

In its analysis, the Court of Appeals for the Sixth Circuit thus failed to note the separate nature of each of the two parts of the inquiry required by the standards of Wood and Scheuer. Nor has any other reported decision of the Sixth Circuit since Wood recognized the need for the defendant to meet the requirements of the first aspect of the standard before proceeding to prove facts in support of the second part of the test.

The methodology employed by the Court of Appeals for the Sixth Circuit has essentially destroyed the Wood requirement that good faith immunity be both subjectively and objectively based. As will be demonstrated below, the Court of Appeals has also weakened each of the test's two parts.

i. Subjective Good Faith

While Scheuer and Wood preclude a court from judicially noticing the presence of a good faith belief without objective evidence, the

Court of Appeals found good faith on the part of all defendants despite the fact that some of them did not appear before the district court or, although present at the hearing, failed to shoulder their burden of proof through the introduction of testimony or other factual evidence. See, supra., pp. 7-8.

From the evidence of those defendants who did testify, the district court found that none of the defendants at any time had sought advice from an attorney as to the legality of the board's mandatory maternity leave policy. While the defendants had received some information concerning possible legal implications of their policy from news sources and from the then Superintendent of Schools, this official was known by them not to be a lawyer. See, supra., pp. 7-8. In Glasson v. City of Louisville et al., 518 F.2d 899 (6th Cir. 1975) cert. denied, 44 U.S.L.W. 3264 (Nov. 4, 1975) (No. 75-383), the Court of Appeals for the Sixth Circuit, in deciding the scope of a police officer's immunity under Pierson v. Ray, supra., as further affected by Scheuer and Wood, specifically noted the need for objective evidence to support an officer's claim of a good faith belief in the necessity of his action. Id. at 909. The court further expressed concern that ignorance of the law not be fostered by permitting a police officer to avoid liability by relying upon his lack of knowledge as a defense. Id. at 909-910.

Where, as here, legal counsel was available by statutory provision, O.R.C. §303.09, and ample time was available for such consultation and analysis, there was less reason by far to excuse defendants' failure to seek legal advice prior to taking action than existed in Scheuer,

supra., Wood, supra., and Glasson, supra.

The Court of Appeals did not explain why it considered that this aspect of the standard had been met. It appears that in fact the court thought it unnecessary for each defendant, separately, to meet the test of demonstrating that his actions were taken "sincerely and with a belief that he is doing right" in view of the determination by the Court of Appeals that the second aspect of the test had been met.

ii Reasonable Grounds For Belief

Although the district court had found that the defendants did not have reasonable grounds in January, 1972, to believe that that portion of the mandatory maternity rule requiring pregnant teachers to leave their jobs at the end of the semester preceding the fifth month of pregnancy was constitutional, this finding was reversed by the Court of Appeals although it failed to hold that this finding was clearly erroneous.

The Court of Appeal's reversal appears to demand that the defendant be accorded the benefits of those legal developments that have occurred since January, 1972, when their action was taken, to the present day. The Court failed to view Reed v. Reed, 404 U.S. 71 (1971), which made clear the skepticism with which this Court viewed the rationale of administrative convenience, as relevant to a determination of the reasonableness of the defendants' beliefs, despite the district

court's finding that the defendants' decision to terminate the Petitioner was based only on administrative convenience. See, infra, p.A-21.

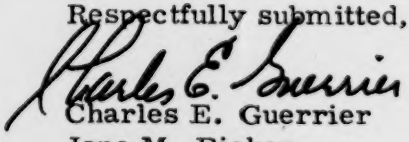
While Reed was deemed not relevant, Geduldig v. Aiello, 417 U.S. 484 (1974), decided subsequent to this Court's decision in Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), was relied on by the Court of Appeals in assessing the reasonableness of defendants' good faith belief.

Petitioner submits that if the defendants are to be permitted to rely upon footnote 20 in Geduldig and Justice Powell's concurring opinion in LaFleur in assessing the reasonable grounds for their belief, they must also be charged with knowledge of the majority opinion in LaFleur, and also Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); and San Antonio Independent School District v. Rodriguez, 411 U.S. 198 (1973).

CONCLUSION

Petitioner submits that the decision of the Court of Appeals for the Sixth Circuit is in conflict with the rulings of this Court and with those of other circuits which have recently interpreted this Court's directives. Petitioner therefore prays that this petition for a writ of certiorari be granted.

Respectfully submitted,



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A-1
Memorandum and Order
Of District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 73-332

(Filed Sep. 23, 1974)

BARBARA LEE SHIRLEY,

Plaintiff,

v.

CHAGRIN FALLS EXEMPTED VILLAGE SCHOOLS BOARD OF EDUCATION, et al.,

Defendants.

THOMAS, J.

Plaintiff Barbara Lee Shirley of Novi, Michigan, but formerly employed as a physical education teacher by the Chagrin Falls Exempted Village Schools Board of Education, sues the Board's five members and the superintendent of schools. At the trial held September 9, 1974, plaintiff repeated the claim made in her complaint, filed April 4,

1973, that the defendants have discriminated against her "as a female employee with respect to her compensation, and terms and conditions of employment." She says that the defendants have deprived her of rights secured by the United States Constitution and the Civil Rights Act of 1871 (42 U.S.C. § 1983) by

> maintaining a policy which requires resignation of a pregnant teacher at the end of the fifth (5th) month of pregnancy or the end of a semester, whichever occurs first, enforcing it against plaintiff, a teacher unwilling to resign, and refusing to allow plaintiff to teach her classes. [1]

---

[1] Board of Education, Pregnancy Policy, Section 320.03

"In the case of pregnancy, the employee shall resign and/or her contract shall become null and void at the end of the fifth (5th) month of pregnancy, or at the end of a semester, whichever occurs first. Abuse of this policy will be a just cause to prevent future re-employment.

"The employee will not be permitted to return to her former position earlier than three months following the birth of the child, and then only upon presentation of a physician's certificate that she is able, in all ways, to perform all the

To support her claim of constitutional deprivation the plaintiff relies on Cleveland Board of Education v. LaFleur, 414 U. S. 632 (1974), which invalidated the Cleveland teacher pregnancy rule. In part, that policy required a pregnant teacher to take unpaid maternity leave five months before the expected child birth (and to make leave application at least two weeks before her departure). As to this requirement the Court found, "[T]he provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth . . . month of pregnancy is physically incapable of teaching," id. at 644, and that that presumption "is neither 'necessarily [nor] universally true.'" Id. at 646. After noting that "administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law," id. at 647, the Court concluded

> [The regulations] cannot pass muster under the Due Process Clause of the Fourteenth Amendment, because they employ irrebuttable presumptions that unduly penalize

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1. cont'd.
duties of her assignment. New applicants will not be considered for employment until this three months' period has elapsed following the birth, and the presentation of the necessary physician's statement.

a female teacher for deciding to bear a child.

Id. at 648.

Plaintiff's complaint asks this court to grant: (1) a declaratory judgment that defendants' policies and practices are unlawful, (2) a permanent injunction enjoining the defendants from "continuing to abridge the rights of plaintiff by discriminating against her on the basis of her sex . . .," (3) a judgment for the plaintiff "requiring defendants to make her whole by appropriate back pay and otherwise for the adverse effect of the practices and policies herein complained of," and (4) an order "allowing plaintiff her costs herein including reasonable attorney's fees."

The plaintiff still seeks a declaration that the Chagrin Falls teacher pregnancy policy is unconstitutional. Plaintiff also requests an order of back pay ($3,762.67) for the second semester that she was not permitted to teach under her contract, monies that she would have earned under a supplemental contract covering after-school intramural activities, and attorney fees. Because plaintiff and her husband now reside outside the state and she does not wish to resume her teaching position with the Chagrin Falls schools, the plaintiff foregoes and withdraws her request for an injunctive order of reinstatement.

In their separate answers all defendants generally deny any liability. Also in their separate answers the School Board member defendants and defendant Cornelius assert by way of affirmative defense

> . . . that the actions taken by the defendants with respect to the plaintiff's resignation were consistent with and in conformity with the laws of the State of Ohio and United States of America, and in conformity with the decisions rendered at that time by the state and federal courts exercising jurisdiction.

Particularizing this affirmative defense at trial, counsel for the School Board members asserted that these defendants are entitled to claim the doctrine of official immunity and that their actions were in good faith. Further, in his opening statement he thus elaborated the defense of good faith:

> With regard to the question of good faith, evidence will show that this particular policy of the Board of Education was adopted in 1964 and continued in effect. The LaFleur case was filed against the Cleveland Board of Education involving a maternity leave policy which is substantially identical to the one

previously in effect in the Chagrin Falls system.

The LaFleur case was filed in this court in March of 1971. This district court rendered its decision in the LaFleur case in May of 1971. Mrs. Shirley conceived her child in September of 1971, and of course the court is aware that the district court decision upheld the constitutionality of this particular policy.

So that it is our position, of course, that at that time that constituted the law of this jurisdiction.

Counsel continued:

Mrs. Shirley tendered two resignations, one in December and one in January--December of '71 and January of '72, and her last day of employment was January 28, 1972. Her baby was born June 21, 1972.

On a time sequence, the next thing that happened was that the Sixth Circuit rendered its decision in the LaFleur case and that decision was rendered on July 28, 1972--I'm sorry, July 27, 1972,

which, of course, determined that such a policy did constitute a violation of teachers' rights in this situation.

At the very next meeting of the Board of Education, which was something like 18 days following the date of the Sixth Circuit decision in LaFleur, [sic] the Chagrin Falls Board of Education suspended and changed the policy which had previously been the law.

I.

The case has been heard on the pleadings, joint pretrial order, trial brief of the School Board member defendants, opening statements of counsel, the evidence, and closing oral arguments. The evidence, largely undisputed, consists of School Board minutes, letters from and to the plaintiff, and oral testimony given by the plaintiff, the superintendent of schools, and members of the Board.

First employed for the school year 1970-71 as a physical education teacher in the Chagrin Falls High School, plaintiff Shirley was rehired for the school year 1971-72. The teaching contract provided that Mrs. Shirley was to receive for her teaching services the sum of $7,910 for the school year, and under a

supplemental contract the Board agreed to pay her the sum of $3.00 per hour "after each intramural activity." Each day plaintiff taught five classes of girls' physical education. After-school intramural activity included soccer, volley ball, basketball, and other team sports.

Plaintiff became pregnant in September, 1971 and in November communicated the fact first to the supervisor of women's physical education, then to the high school principal. At the latter's direction she spoke to defendant Cornelius, at that time assistant superintendent under Superintendent Warren F. Thomas.[2] As a consequence of her conference with Assistant Superintendent Cornelius, plaintiff wrote to the School Board on December 7, 1971. The letter began:

> I have recently been informed by Mr. Cornelius of the school board's policy regarding termination of teaching contracts of pregnant faculty members. Specifically, I refer to the five months or end of semester policy.
>
> It is my wish to present my resig-

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[2] Loyal T. Cornelius succeeded Dr. Thomas as superintendent on August 1, 1972.

> nation effective March 1, 1972; i.e., at the point of five months of my pregnancy.

Her letter proceeded:

> Granting my request would enable the successful completion of the first interscholastic competition in basketball for all girls of Chagrin Falls High School. This request is presented with the conviction that all policys [sic] have as their purpose the providing of the best total educational environment for Chagrin Falls students and not establishment of dogma inflexible to the betterment of that environment.

Superintendent Cornelius says that he presented Mrs. Shirley's letter to the members of the School Board [3] at an executive session (also called work study session) following the regular

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[3] The Board through December 31, 1971, consisted of Wilmeth G. Burns, Dr. William E. Cox, Jr., Ernest C. Martt, All Malmquist, and Ina Mae Wagner. Lydia F. Champlin and John L. Evans were elected at the November, 1971 election to succeed members Martt and Wagner. Cox and Malmquist served through 1973 and have been succeeded by James G. Watterson and John Wilharm.

Board meeting of December 20, 1971. At that time the Board decided to adhere to its pregnancy policy, Cornelius testified. Member Cox and member-elect Champlin believe that this executive session was devoted to election of the officers of the newly constituted board. They do not recall that the Shirley matter was then discussed. Since no minutes are kept of executive sessions, this conflict in testimony cannot be resolved by any board records. In any event, the Board members admit that they knew of Mrs. Shirley's pregnancy. Mrs. Champlin believes that she learned of it at a Board study session on November 22, 1971. Mr. Burns remembered that at some time the Shirley case had been discussed with Mr. Cornelius and that it was the consensus of those present that the Board's pregnancy policy should prevail.

Mrs. Shirley's letter of December 7 was answered by Assistant Superintendent Cornelius in a letter dated December 21, 1971. It began:

> I forwarded a copy of your letter of December 7, 1971 to each member of the Board of Education. It is the feeling of the Board that we should adhere to our existing policy pertaining to teacher pregnancy. As you know, this means that your employment with the Chagrin schools would terminate at the end of the present semester, January 28, 1972.

The next paragraph of the letter read:

> I am, therefore, requesting that you send a letter of resignation to me to be effective at the end of the present semester. This letter will be submitted and approved at the last Board meeting in January (January 17).

On January 17, Mrs. Shirley submitted her letter of resignation. It stated:

> Without prejudice to any issues involved in my previously submitted letter to the Board, I do herewith present my written resignation due to pregnancy as outlined in Section 320.03-Pregnancy policy.
>
> The teaching experience enjoyed by me over the last several years at Chagrin Falls High School has been warm and rewarding. Due to this, you can be assured that I shall communicate to you at the earliest opportunity any possible reinstatement desire as is also outlined in Section 320.03-Pregnancy policy.

The Board was aware of the LaFleur case when it took up Mrs. Shirley's letter of resignation. Dr. Cox said that Dr. Thomas, superintendent, said to be "much interested in

school law," had made the Board aware of court activity. Dr. Cox's testimony was to the effect that in November or December, 1971 he learned that the LaFleur case had been decided against the teacher. He was aware of this case and some cases nationally. Mr. Burns recalled that toward the middle of 1971 there was a ruling by the late Judge James C. Connell of this court in favor of the School Board. Asked if at the time action was taken on Mrs. Shirley's case he was aware of the LaFleur case, he answered, "Yes."

The Board pregnancy policy did prevail. At its regular meeting of January 17, 1972, the Board accepted the "resignation of Mrs. Barbara Shirley with regret, effective January 28, 1972."

On May 12, 1971, Judge Connell decided LaFleur v. Cleveland Board of Education, 326 F. Supp. 1208 (N.D. Ohio 1971). In substance he ruled that the Cleveland School Board pregnancy policy did not violate the constitutional rights of Mrs. LaFleur. His decision was reversed by the Sixth Circuit Court of Appeals, 465 F. 2d 1184 (July 27, 1972). The majority opinion declared:

> Under no construction of this record can we conclude that the medical evidence presented supports the extended periods of mandatory maternity leave required by the rule

> both before and after birth of the child.
>
> . . . .
>
> . . . This record indicates clearly that pregnant women teachers have been singled out for unconstitutionally unequal restrictions upon their employment. Additionally, as we have observed, the rule is clearly arbitrary and unreasonable in its overbreadth.

Id. at 1188.

The minutes of the Chagrin Falls Board of Education for its meeting on August 14, 1972, disclose:

> A review of the Board of Education Pregnancy Policy, 320.03 was then discussed. A request has been made by the C.F.E.A. [Chagrin Falls Educational Association] that this policy be revised. Mr. Cornelius recommended that the present policy be temporarily suspended, until a revised statement is presented for adoption.

II.

Defendants' trial brief asserts the Eleventh

Amendment of the Constitution as a defense. Citing Hall v. Columbus Board of Education, 32 O. App. 2d 97, and other Ohio cases, it states that "a school board is an instrumentality of the State of Ohio." The argument proceeds:

> As an instrumentality of the State of Ohio, the Board of Education, and its members in their official capacities, is immune to an award of damages and attorney fees under the Eleventh Amendment of the Constitution.

The Eleventh Amendment does not expressly bar suits against a state by its own citizens. Nonetheless, the Supreme Court holds that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State," Edelman v. Jordan, 42 U.S.L.W. 4419, 4422 (U.S. March 25, 1974), and earlier cases there cited. As related holdings Edelman reiterates that "even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment," and

> Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.

Id.

In contradistinction, plaintiff Shirley seeks to hold the Board members and superintendent personally liable and not to recover from public funds in the Board treasury. A few weeks after Edelman, the Supreme Court decided Scheuer v. Rhodes, 42 U.S.L.W. 4543 (U.S. April 17, 1974), that ruled out the Eleventh Amendment defense in section 1983 actions for damages brought individually against officers of the executive branch of government and at the same time qualified the executive officer's defense of official immunity. Scheuer observes:

> [S]ince Ex parte Young, 209 U. S. 123 (1907), it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law.

Id. at 4545. Scheuer went on to hold:

> Ex parte Young teaches that when a state officer acts under the state law in a manner violative of the Federal Constitution, he
>
> > "comes into conflict with the superior authority of that Constitution and he is in that case stripped of his official or representative character

> and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." 209 U. S. at 159-160. (Emphasis supplied.)"

Scheuer, supra, at 4545. Ex party Young, supra upheld a federal injunctive action brought under the Fourteenth Amendment to enjoin the enforcement of an unconstitutional law. In view of Ex parte Young it is evident that the Eleventh Amendment would not bar prospective injunctive relief to order the Board members to reinstate the plaintiff to her former teaching position. But as seen, the plaintiff has surrendered her claim for reinstatement.

In Scheuer, supra and the two related cases "the personal representatives of the estates of three students who died in [the Kent State University tragedy] seek damages against the Governor, the Adjutant-General and his Assistant, various named and unnamed officers and enlisted members of the Ohio National Guard and the President of Kent State University." The district court dismissed these wrongful death actions, brought under 42 U. S. C. § 1983, and the Court of Appeals affirmed the action of the district court, [4] "agreeing that the

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[4] 471 F. 2d 430 (1972).

suit was in legal effect one against the State of Ohio and, alternatively, that the common law doctrine of executive immunity barred action against the state officials" who were named as defendants. Scheuer, supra at 4544.

Reversing the Court of Appeals, the Supreme Court ruled that plaintiffs' claims are not barred by the Eleventh Amendment. Hence, Scheuer precludes the Eleventh Amendment defense which defendants assert in this case.

Scheuer also held that the Court of Appeals erred in concluding that there is absolute "executive immunity" as an alternative ground for sustaining the dismissal of the complaint by the district court. Rather, the Supreme Court concluded that

> [A] qualified immunity is available to officers of the executive branch of Government, the variation dependent upon the scope of discretion and responsibilities of office and all the circumstances as they reasonable appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the cimcumstances, coupled with good faith belief, that affords basis for qualified immunity

of executive officers for acts performed in the course of official conduct.

Scheuer, supra at 4548.

This definition of qualified immunity applies to the chief doctrine of defendants. As seen earlier, the defendants, relying principally on Smith v. Losee, [sic] 485 F. 2d 334 (10 Cir. 1973), cert. denied, 42 U.S.L.W. 3652 (May 28, 1974), assert their defense of official immunity solely in terms of a good faith defense. [5] But it is plain that Scheuer, building particularly upon Pierson v. Ray, 386 U. S. 546 (1967), holds that a showing of good faith on the part of the executive officer is not enough. [6] To be immune from personal damages in a 1983 action, arising out of acts which he performed in the course of his

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[5] But see Duell v. Lawson, [sic] 489 F. 2d 877 (10 Cir. 1974) (which states "[t]he standard announced in Smith v. Losee must be applied on a case to case basis. It is elusive.").

[6] Accord, Eslinger v. Thomas, 476 F. 2d 225 (4 Cir. 1973); Kirstein v. Rector and Visitors of University of Va., 309 F. Supp. 184 (E.D. Va. 1970).

duties, the officer in the executive branch of government must establish that at the time of the action on which liability is sought (1) he had reasonable grounds for believing in light of all the circumstances that his action was constitutional and (2) he acted in good faith, that is, with an honest belief.

Measured by this two-step test, the defendants' affirmative defense of qualified official immunity will now be examined.

IV. [sic]

On January 17, 1972, the date when the Board accepted plaintiff Shirley's resignation, the evidence indicates that at least several Board members were aware of Judge Connell's decision of May 12, 1971, which upheld the constitutionality of the Cleveland School Board pregnancy policy in the LaFleur case. Along with that knowledge the Board was chargeable with the knowledge that Judge Connell's decision was pending on appeal in the Sixth Circuit Court of Appeals and subject to reversal. Moreover, the Board was chargeable with knowledge that the Cleveland School Board pregnancy policy did not include a provision, present in the Chagrin Falls School Board pregnancy policy, that required the resignation of a pregnant teacher "at the end of a semester" if that date occurred before the end of the fifth month of pregnancy. Hence the Board was charged with knowledge

that this different and separable provision of the Chagrin Falls School Board pregnancy policy was not directly or even indirectly affected by Judge Connell's decision in the LaFleur case.

The minutes of the Board meeting of January 17 do not reflect or explain the basis upon which the resignation of Mrs. Shirley was accepted. But her letter of resignation dated January 17 stated:

> Without prejudice to any issues involved in my previously submitted letter to the Board, I do herewith present my written resignation due to pregnancy as outlined in Section 320.03--pregnancy policy.

The issue raised in her letter of December 7, 1971, was her

> wish to present [her] resignation effective March 1, 1972; i.e., at the point of five months of. . . pregnancy.

Responding to her letter, defendant Cornelius in his letter of December 21, 1971, informed the plaintiff, "It is the feeling of the Board that we should adhere to our existing policy pertaining to teacher pregnancy," and he therefore requested that she "send a letter of resignation to [him] to be effective at the end of the present

semester." He said this letter would be "submitted and approved at the last Board meeting in January (January 17)." In view of the express request by defendant Cornelius that Mrs. Shirley's resignation be "effective at the end of the present semester," and the failure of either his letter or the minutes of January 17, 1972 to refer to the LaFleur decision, it is concluded and determined that in forcing Mrs. Shirley's resignation the Board members relied solely on the Board's pregnancy policy provision that voided her contract because of her pregnancy "at the end of a semester [if it] occurs first."

It seems apparent that the Board turned down Mrs. Shirley's request to remain until the end of the fifth month of her pregnancy (end of March) because of the convenience to the Board and the school administration of hiring a new high school physical education teacher to replace Mrs. Shirley for the entire second semester. In doing so, the Board applied a policy that was arbitrary on its face. Under that policy the teacher who became pregnant a month before the end of the first semester was required to notify the administration immediately that she was pregnant. She knew the policy provided, "Abuse of this policy will be a just cause to prevent future re-employment." Under such circumstances a teacher, pregnant just one month, would be required to resign at the end of the first semester, even though the end of the fifth month of pregnancy might substantially coincide with the end of the second semester.

In forcing the resignation of Mrs. Shirley at the end of the first semester, the Board members could not rely on the LaFleur case even though the Cleveland School Board pregnancy policy, upheld by Judge Connell, required resignation of the pregnant teacher at the end of the fourth month of pregnancy, and in Mrs. Shirley's case her resignation came substantially at the end of her fourth month of pregnancy. Having fixed the end of the fifth month in the Chagrin Falls policy as the effective date for voiding the contract of the pregnant teacher, the Board members were required to consider the reasonableness of the earlier "end of a semester" resignation date. But for that provision a pregnant teacher was entitled to teach to the end of the fifth month of pregnancy.

As previously held, proof of good faith is not enough. The Board members could not rely alone on their belief, though honest, that their pregnancy policy was valid and should prevail. Instead, the Board members bore the burden of establishing that at the time there were reasonable grounds for believing that the policy did not deprive pregnant teachers in general, and Mrs. Shirley in particular, of their constitutional right to liberty, to exercise personal choice in matters of family life in conjunction with teaching responsibilities.

It is concluded and determined that there were no reasonable grounds to enforce the "end of a semester" cutoff of the teaching contract of Mrs. Shirley. Relying on the LaFleur case

permitted the Board members to go no further than to require Mrs. Shirley to resign at the end of the fifth month of pregnancy. Even though they undoubtedly acted in the honest belief that they were entitled to maintain their pregnancy policy in all of its aspects, the arbitrary deprivation of Mrs. Shirley's constitutional rights under the Fourteenth Amendment prevents the Board members from relying on the defense of qualified official immunity. Their violation of the constitutional rights of Mrs. Shirley by enforcing the "end of a semester" cutoff of her teaching contract, in the words of Ex parte Young, "stripped [the individual Board members] of [their] official or representative character." Their actions subjected them to personal liability for their unconstitutional arbitrary conduct under color of state law.

Upon the entire record and for the foregoing reasons it is concluded and determined that the Board members in their individual capacity are ordered to pay to the plaintiff her compensation under her teaching contract up to and including March 1, 1972. Based on the remaining balance of $3,762.67 for the second semester the amount due through March 1 is fixed at $840. With the likely concentration of intramural basketball activities required under the plaintiff's supplemental contract during February, it is estimated that she would have worked after school two and a half hours, at least two days a week, for four weeks. At $3.00 an hour her

extra compensation for February is fixed at $60. This amount is reasonable, since the plaintiff's total supplemental earnings for the second semester of the preceding year were $157.50. Plaintiff is also entitled to interest at six percent simple interest for the period March 1, 1972 to September 15, 1974. This is computed at $317.25.

Plaintiff's request for attorney's fees must be denied. Though occasionally federal courts do award attorney's fees to the successful party,[7] no exceptional circumstances that would warrant such an award exist in this case.

No judgment will be entered against the defendant Cornelius, since he had no control over the adoption or the enforcement of the pregnancy policy of the School Board. An appropriate order shall be entered by the Clerk.

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[7] The Court recently summarized the types of occasions where attorney's fees have been awarded. They are (1) where the party's opponent has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons," or (2) "where a successful litigant has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefitted class," or (3) where private litigation is necessary to enforce important public policies ("private attorney general rationale"). F. D. Rich Co. v. Industrial Luber Co., 42 U.S.L.W. 4783, 4787-88 (U.S. May 28, 1974).

Judgment is entered in the total sum of $1,037.25 in favor of the plaintiff and against the defendant School Board members personally.

IT IS SO ORDERED.

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United States District Judge

A-26

No. 75-1180

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BARBARA LEE SHIRLEY, *Plaintiff-Appellee,* v. CHAGRIN FALLS EXEMPTED VILLAGE SCHOOLS BOARD OF EDUCATION, et al, *Defendants-Appellants.*	APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed September 16, 1975.

Before: MILLER and ENGEL, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

ENGEL, Circuit Judge. This is an appeal by the individual members of the Chagrin Falls Board of Education[1] from a judgment entered by the district court ordering them to pay $1,037.25 as damages to plaintiff Barbara Lee Shirley, a former school teacher in the Chagrin Falls system.

Barbara Shirley, a physical education teacher at Chagrin Falls High School, discovered she was pregnant in November, 1971, and was due to give birth in June, 1972. During this period, the Board of Education had the following pregnancy policy in effect:

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[1] By order of September 4, 1973, the district court dismissed the School Board as an entity as a defendant, holding that the Board was not a "person" within the meaning of § 1983 and thus could not be held liable under that statute. This order is not appealed from by plaintiff.

> "Section 320.03. In the case of pregnancy, the employee shall resign and/or her contract shall become null and void at the end of the fifth (5th) month of pregnancy, or at the end of a semester, whichever occurs first. Abuse of this policy will be a just cause to prevent future re-employment.
>
> The employee will not be permitted to return to her former position earlier than three months following the birth of the child, and then only upon presentation of a physician's certificate that she is able, in all ways, to perform all the duties of her assignment. New applicants will not be considered for employment until this three months' period has elapsed following the birth, and the presentation of the necessary physician's statement."

The Board pregnancy policy had been in effect since 1964.

On December 7, 1971, plaintiff notified the school board members by letter that she wished to teach until the end of her fifth month of pregnancy (March 1, 1972), rather than resign at the end of the first semester. Her request was informally rejected, though no formal Board action was taken. In response to this decision of the Board, plaintiff submitted a second letter of resignation effective at the end of the first semester. Following the birth of her child, plaintiff left the state and has not sought reinstatement as a teacher.

Mrs. Shirley brought an action in federal district court pursuant to 42 U.S.C. § 1983 alleging that application of the pregnancy policy to her discriminated against her as a female employee and deprived her of her rights, privileges and immunities secured by the Constitution. She sought as relief back pay and attorney's fees.

At the non-jury trial, defendants did not contend that their pregnancy policy was constitutional in light of *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974), but instead interposed several affirmative defenses to liability. First, they contended at trial that a monetary award against

Board members was barred by the Eleventh Amendment. On the basis of *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), the district judge rejected this defeuse.

Defendants' second affirmative defense was that of a "qualified immunity". The district judge, again relying upon *Scheuer* v. *Rhodes, supra,* recognized that the school board members did enjoy a qualified immunity for official acts performed in good faith and upon a reasonable belief that the acts performed were constitutional.

Further, he found that on January 17, 1972, the date on which the Board accepted Mrs. Shirley's resignation, several members of the Board were aware of Judge Connell's decision in *LaFleur* v. *Cleveland Board of Education*, 326 F. Supp. 1208 (N.D. Ohio 1971), which had upheld a similar pregnancy policy. The district judge also found that the defendants had acted in the good faith belief that their pregnancy policy was valid and should be adhered to by the Board.

Nevertheless, the district judge saw the key question as being whether the Board members had met their burden of showing that at the time of Mrs. Shirley's forced resignation, there were reasonable grounds for believing the pregnancy policy did not deprive Mrs. Shirley of her constitutional rights. He held that in reliance upon the district court decision in *LaFleur*, the defendants had reasonable grounds to believe that the policy requiring resignation at the end of the fifth month of pregnancy was constitutional. However, he concluded that the district court decision (not as yet reversed by the Sixth Circuit) provided no reasonable grounds for belief that the "end of a semester" policy was constitutional because such a policy was not involved in *LaFleur*.

He found that this policy was clearly enacted for the convenience of the Board and school administrators so as to allow them to hire teachers for an entire semester, and as such was arbitrary on its face.

The district judge held that this arbitrary policy deprived Mrs. Shirley of her constitutional right to liberty in the

exercise of personal choice in matters of family life in conjunction with teaching. Concluding there was no reasonable basis for believing this policy to be constitutional, the district judge held that under *Scheuer* v. *Rhodes, supra,* defendants were stripped of any qualified immunity they might have had for their actions. Thus, the district judge awarded damages in the amount of $1,037.25, this being the amount of back pay which Mrs. Shirley lost between the end of the first semester (January 28) and the end of her fifth month of pregnancy (March 1), plus interest.

At the time of the district judge's decision, he did not have the benefit of the later Supreme Court decision in *Wood* v. *Strickland,* 420 U.S. 308 (1975), which dealt directly with the liability of school board members, although not in the context of dismissal of a teacher. There Mr. Justice White set forth the following standard of qualified immunity which the Court enunciated for school board members:

> To be entitled to a special exemption from the categorical remedial language of § 1983 in a case in which his action violated a student's constitutional rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. Such a standard neither imposes an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of § 1983. Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would

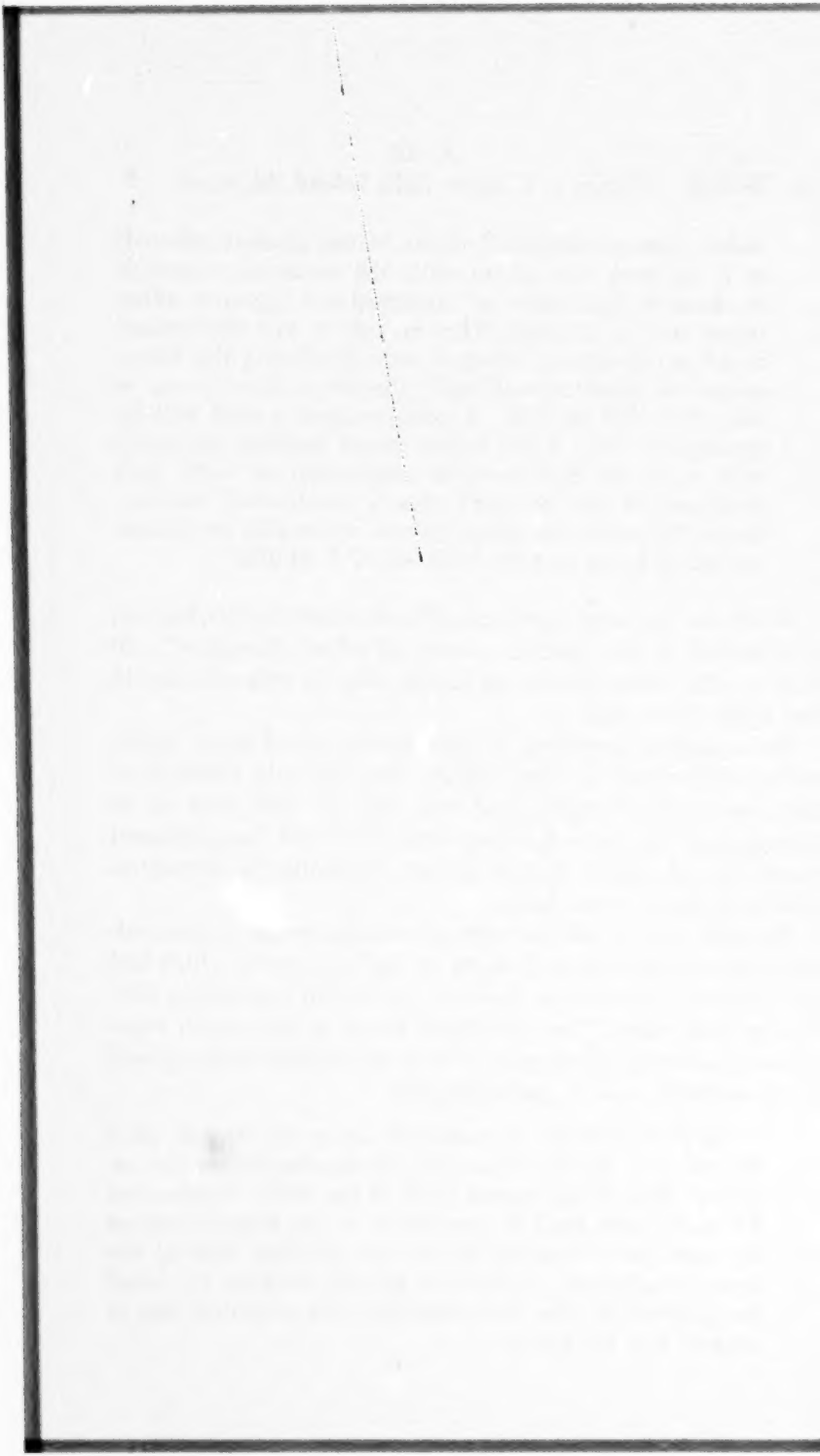
> violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are "charged with predicting the future course of constitutional law." Pierson v. Ray, supra, at 557, 18 L Ed 2d 288. A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith. 420 U.S. at 322.

While the majority opinion in *Wood* stated that its holding was limited to the 'specific context of school discipline", 420 U.S. at 322, there appears no reason why its rationale should not apply here also.

The question, therefore, is whether the school board action taken with regard to Mrs. Shirley was not only violative of her constitutional rights, but was also at that time so in disregard of the "settled, indisputable law" and "unquestioned constitutional rights" that it cannot reasonably be characterized as being in good faith.

To some extent, this determination requires an understanding of the district court decision in *LeFleur, supra,* which had not yet been reversed at the time the action concerning Mrs. Shirley was taken. The Cleveland Board of Education regulation concerning pregnancy, which the district court upheld in its entirety, read in pertinent part:

> "APPLICATION A maternity leave of absence shall be effective not less than *five (5) months before the expected date* of the normal birth of the child. Application for such leave shall be forwarded to the Superintendent as least *two (2) weeks before the effective date of the leave of absence.* A leave of absence without pay shall be granted by the Superintendent for a period not to exceed *two (2) years.*



> "REASSIGNMENT A teacher may return to service from maternity leaves not earlier than the *beginning of the* regular school semester which follows the child's age of *three (3) months.* In unusual circumstances, exceptions to this requirement may be made by the Superintendent with the approval of the Board.

Judge Connell's opinion in the district court upheld the requirement that teachers resign at the end of the fourth month of pregnancy on the ground that the chances of injury due to violence or accident were greater to pregnant women and that the requirement helped insure classroom continuity when a teacher was required to leave because of pregnancy. The court upheld the portion of the regulation which allowed a teacher to return only at the beginning of the first semester after the child reached three months of age on this ground:

> "The provision for resumption of employment after the child's birth serves the purposes of maintaining classroom continuity and protecting the health of the mother and child." 326 F. Supp. at 1213

On appeal the defendants contend that the pregnancy policy of the Cleveland Board upheld in *LaFleur* and the Chagrin Falls policy were so substantially similar that the Board was justified in relying upon the decision in *LaFleur* in enforcing their entire policy. They concede that the Cleveland policy had no "end of a semester" resignation requirement, but they note that the Cleveland policy required resignation one month earlier than did the Chagrin Falls policy. They also note that Judge Connell's decision in *LaFleur* upheld a provision of the Cleveland policy which did not allow a teacher to return to work until the beginning of the first semester *after* her child reached three months of age. They argue that this provision, like the "end of a semester" provision involved here, was surely promulgated for the convenience of the Board and the school

administration, allowing the Board to hire teachers for a full semester. They argue that where such a provision had been judicially upheld in the context of rehiring teachers after the birth of a child, it was reasonable for the defendants to assume it would be upheld in the context of pre-birth resignations.

Defendants also note that there were no binding judicial decisions in conflict with the pregnancy policy at the time of the Board's action. The sole case indicating such a policy would violate constitutional rights was *Cohen* v. *Chesterfield County School Board,* 326 F. Supp. 1159 (E.D. Vir. 1971). This district court decision would not, of course, be binding in the Sixth Circuit.

Although the case was not mentioned in the district court opinion, appellees at oral argument and in their brief suggest that on the basis of *Reed* v. *Reed,* 404 U.S. 71 (1971), defendants should have known that their "end of a semester" policy, based as it was upon the administrative convenience to the Board in hiring teachers, was clearly unconstitutional. In *Reed,* an Idaho statute which designated persons who are entitled to administer the estate of one who dies intestate, gave a mandatory preference to males over females where otherwise under the statute the two parties would be equally entitled to administer the estate. In holding that the statute was unconstitutional, the Supreme Court stated:

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex. 404 U.S. 76, 77

Appellees contend that *Reed* clearly indicates that discrimina-

tion on the basis of sex for the purpose of administrative convenience is unconstitutional, and since the *Reed* decision has been issued prior to the Board's action relative to Mrs. Shirley, they were acting in violation of her clearly established constitutional rights in requiring that she resign at the end of the semester prior to the end of her fifth month of pregnancy.

Reed, however, involved a clear case of discrimination on the basis of sex alone. In *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), the Court held that statutory classifications dealing with pregnancy are not necessarily classifications on the basis of sex. In *Geduldig*, a California statute providing for payment of disability benefits excluded disability resulting from normal pregnancy. In holding that the statute did not violate the Equal Protection Clause of the Fourteenth Amendment, the Court stated in a footnote:

> The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed* v. *Reed*, 404 U.S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition — pregnancy — from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, *supra*, and *Frontiero*, *supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.
>
> 417 U.S. at 496, n. 20

It should also be noted that when the Supreme Court upheld the Sixth Circuit reversal of the district court decision in *LaFleur*, it did so not on the basis that the statute discriminated on the basis of sex, but rather on the ground that the pregnancy policy created irrebuttable presumptions not constitutionally permissible.

It is important also that the Supreme Court in *LaFleur*, both in the majority opinion and Justice Powell's concurring opinion, noted that the school board might have a legitimate interest in wanting teachers to resign at the end of a semester, as it "rationally serves this legitimate state interest" (of insuring continuity). 414 U.S. at 654 (Powell, J., concurring). However, because the end of semester provision operated in connection with an absolute cutoff point in terms of months, the Supreme Court found it not to be rational.

From the foregoing, it can be seen that at the time the Board decision was made, there had in fact been no adjudication binding on the Board that its existing pregnancy policy was unconstitutional, let alone unquestionably so. To compel the Board members to respond personally in damages in such circumstances would be to hold that they were "charged with predicting the future course of constitutional law", *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967).

Two further arguments in support of affirmance are presented which merit brief discussion.

Plaintiff argues that the defense of qualified immunity is applicable only to actions for damages and not to suits for back pay. Since this is a suit to recover back pay, she claims that the defense of qualified immunity should not have been considered in any event.

While there is support for the contention that back pay, when sought in conjunction with reinstatement, is considered part of the total equitable remedy, see *McFerren* v. *County Board of Education of Fayette Co., Tenn.*, 455 F. 2d 199 (6th Cir. 1972), *cert denied* 407 U.S. 934 (1972), it seems equally clear that where the action is against the individual members

of the Board, it is in effect an action for damages, whether it is styled as such or not. *Skehan* v. *Board of Trustees of Bloomsburg State Col.*, 501 F. 2d 31, 43 (3rd Cir. 1974), *judgment vacated* 43 U.S.L.W. 3624 (May 27, 1975).[2]

Finally, appellee argues that because her letter of resignation was discussed and considered at an "Executive Session" following a regular board meeting, and at this executive session the decision was made not to honor her request to remain until the end of her fifth month of pregnancy, defendants have waived any claim of qualified immunity they might have. The rationale is that such meetings are not authorized by statute and thus defendants' actions are *ultra vires* and not entitled to any immunity.

The minutes of the Regular Meeting of the Board of Education of January 17, 1972 reveal that the decision to accept her resignation was made at that meeting. O.R.C. § 121.22 requires that all meetings of state agencies at which formal action (such as resolutions, regulations, rules, etc.) is to be taken be open to the public, but it seems to contemplate that such agencies also be allowed to meet in executive session if no such formal action is to be taken at the meeting. *State ex rel Humphrey* v. *Adkins*, 18 Ohio App. 2d 101, 247 N.E. 2d 300 (1969). Here, since the only formal action was taken at a regularly scheduled meeting, the statute was not violated.

Reversed and remanded for entry of judgment for the defendants.

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[2] The judgment in *Skehan, supra*, was vacated by the Supreme Court and remanded to the Court of Appeals for reconsideration in light of *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. ——— (1975), and *Wood* v. *Strickland, supra*, neither of which would appear to have any bearing on the question of back pay.

CERTIFICATE OF SERVICE

Three copies of the Petition for a Writ of Certiorari and Appendix have been furnished, by United States mail, first-class, postage prepaid, to John C. Burkholder, Esq., Means, Bichimer, Burkholder & Baker Co., L.P.A., 50 West Broad Street, 35th Floor, Columbus, Ohio 43215, Attorneys for Defendants-Respondents this 14th day of December, 1975.

Charles E. Guerrier

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Attorney for Petitioner